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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

LESTER ETTMAN,
Petitioner,

vs.

FEDERAL LIFE INSURANCE COMPANY,
Respondent.

No. 426

ANSWER OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

WAYNE ELY,
418 Olive Street,
St. Louis, Missouri,
Counsel for Respondent.

KENNETH L. MERLEY,
168 North Michigan,
Chicago, Illinois,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
The issues	1
The facts	3
Reply to	
Petitioner's Point I	7
Petitioner's Point II	7
Petitioner's Point III	10
Petitioner's Point IV	14
Petitioner's Point V	15
Petitioner's Point VI	15
Conclusion	15

Cases Cited.

Becker v. Surety Company, 105 Kansas 99, 181 Pac. 549	9
Boillot v. Income Guaranty Co. (Mo. A.), 83 S. W. (2nd) 219	8
Brasfield v. United States, 272 U. S. 448, 450, 47 S. Ct. 135, 71 L. Ed. 345	14
Elliff v. Insurance Co., 153 Kans. 177, 109 Pac. (2) 92	8, 9
Fairmount Gas Works v. Cub Fork Coal Co., 287 U. S. 474, 480, 53 S. Ct. 252, 77 L. Ed. 439	14
Glaser v. Pacific Mutual Life Ins. Co., 245 Mo. 377, 150 S. W. 549	11
Helvering v. Hormel (C. C. A. 8), 111 F. (2d) 1, affirmed 312 U. S. 552, 557, 61 S. Ct. 719, 85 L. Ed. 1037	14
Jacobs v. Omaha Life Association, 146 Mo. 523, 48 S. W. 462	12
Jeffries v. Economical Mutual Life Ins. Co., 92 U. S. 377, 23 L. Ed. 610	13

Jenkins v. Covenant Mutual Life Ins. Co., 171 Mo. 375, 71 S. W. 688 12
Keller v. Insurance Co., 198 Mo. 440, 95 S. W. 903 11
Kern v. Legion of Honor, 167 Mo. 471, 67 S. W. 252, 257 ..... 11, 12
Kettenbach v. Omaha Life Assn. (Neb.), 69 N. W. 135 13
Lamport v. General Accident Fire & Life Assurance Corp., 272 Mo. 19, 197 S. W. 95, 96, 100 8
Makos v. Bankers' Accident Ins. Company (Mo. A.), 234 S. W. 369 8
New York Central R. R. Co. v. Johnson, 279 U. S. 310, 318, 49 S. Ct. 300, 73 L. Ed. 706 14
Piedmont & Arlington Life Ins. Co. v. Ewing, 89 U. S. 47, 22 Wall. 47, 22 L. Ed. 833 13
Schuerman v. Ins. Co., 165 Mo. 641, 65 S. W. 723 11
Trapp v. Metropolitan Life Ins. Co. (C. C. A. 8), 70 Fed. (2d) 976, 981, certiorari denied 293 U. S. 596, 55 S. Ct. 112, 79 L. Ed. 690 14
Ward v. Standard Insurance Co., 30 Fed. (2d) 328 ... 13
Wiborg v. United States, 163 U. S. 632, 658, 16 S. Ct. 1127, 1197, 41 L. Ed. 289 14

Statutes Cited.

Kansas G. S. 1935, Sec. 40-418 9
Missouri R. S. 1939, Sec. 5843 ..... 7, 10

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ANSWER OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

No reason is apparent why the Court should grant the writ in this case. Despite petitioner's protestations to the contrary, the Court of Appeals did not decide this case against the law of Missouri as declared by the statutes or the courts of that state. The opinion of the Court of Appeals is not in conflict with any Missouri case, any federal case, nor with the weight of authority. No question of general interest or of great public importance is involved.

THE ISSUES.

Petitioner's "Statement of Matter Involved," under which heading he purports to set out the facts and also to define the issues raised by the pleadings, is, in several respects, grossly unfair, untrue, and misleading.

At page 3 of the petition (fourth line from the bottom) petitioner says, "in the defense of the instant suit, the Company relied upon 'a theory of fraud and misrepresentation made with intent to deceive.' "

Where the purported quotation might be found is not indicated. While it is true that the Company pleaded intentional fraud as a defense to the instant suit, it also pleaded that petitioner, plaintiff in the action, in his application for the insurance policy sued on, made false statements with reference to matters material to the acceptance of the risk and the hazard assumed by the Company, which false statements plaintiff (petitioner) certified to be true, and on which the Company relied. Fraud and false warranty are alleged conjunctively in the Company's answer to plaintiff's petition (R. pp. 10-17), the District Court so found (R. p. 288), and the Circuit Court of Appeals so declared (R. pp. 308-309).

The Circuit Court of Appeals, in its opinion, stated the issue as follows:

> "The substantial question for decision is whether, under Missouri law, a statement in an application for a policy of limited disability insurance, without death benefits, will defeat recovery upon the policy if the statement was untrue and material but made without intent to deceive, and the insured certified to the truth of the statements made in his application, and the policy provided that 'The falsity of any statement in the application, materially affecting either the acceptance of the risk or the hazard assumed hereunder, or made with intent to deceive, shall bar all right to recovery under this policy' " (R. p. 308).

And the Court of Appeals found:

> "The defense asserted by the Company was, in substance, that the insured lost his eyesight as the result of a degenerative disease of the eyes * * * that he

had * * * when he applied for the policy * * * that in his application he answered falsely, and with intent to deceive, certain questions; that if the Company had known that the answers were false, it would not have issued the policy; that * * * the insured certified that his answers to all questions contained in the application were complete and true; and that he agreed, in both the application and the policy, that the falsity of any answer made with intent to deceive or which was material should bar recovery under the policy" (R. p. 309).

THE FACTS.

Petitioner's statement of the facts is incomplete and inaccurate. He has ignored certain material facts shown by the record and misstated other material facts.

Briefly, the facts are that on January 3, 1928, petitioner applied to the Company for a policy of insurance to provide him with benefits of $300.00 a month if he should lose the sight of both eyes through accidental injury or sickness. In his application for the policy petitioner represented that he was not suffering from "any disease of either eye" (R. p. 74); that he did not have and never had any "difficulty with eyesight or hearing" (R. p. 77); that he had not within ten years consulted or been treated by a physician for difficulty with his eyesight (R. p. 77). He agreed that the falsity of any material answer should bar his right to recover under the policy (R. p. 74), and certified that he had made the answers appearing in the application and that each answer was "full, complete and true" (R. p. 78).

The policy in suit stated that it "is issued in consideration of the statements and agreements contained in the application * * *" and that "The falsity of any statement in the application, materially affecting either the acceptance of the risk or the hazard assumed hereunder, or made

with intent to deceive, shall bar all right to recovery under this policy" (Plaintiff's Exhibit A, R. p. 23).

In October, 1940, plaintiff filed this suit (R. p. 2), alleging that he had lost the sight of his eyes in January, 1936 (R. p. 3). The record shows that he did lose the sight of his eyes in 1936.

Plaintiff did not testify in his case in chief (R. pp. 2-58). The evidence adduced by plaintiff shows that his blindness resulted from a disease known as retinitis pigmentosa (R. p. 28), from which he had been suffering for several years (R. p. 30); that for several years prior to 1928 plaintiff had been suffering from difficulty with his eyesight, and had consulted and been examined by several eye specialists and doctors in an effort to determine the nature of his trouble (R. pp. 46-47).

The evidence adduced by defendant shows that in January, 1918 (ten years before the insurance policy was applied for) plaintiff was sent by his physician to Barnes Hospital in St. Louis, where he remained for four days (R. p. 59). When he entered the hospital he gave a history of "near-sightedness and night blindness" (R. p. 82); of inability to read writing on the blackboard at school seven years before; "difficulty in going about at night" and limitation of the fields of vision of both eyes (R. p. 83).

In June, 1917, plaintiff registered for the draft in World War I (R. pp. 84-85), and reported to his local board that he did not consider that he was then sound and well because he had "weak eyes." The examining physician of the local board found the vision of his right eye to be 3/192 and of the left eye 3/150 (R. p. 86), and the examiner for the medical advisory board found that he was "physically deficient and not physically qualified for military service by reason of partial atrophy with contracted retinal arteries, probably a case of retinitis pigmentosa" (R. p. 87). On January 7, 1918, plaintiff claimed

exemption from the draft and deferred classification as a "person totally and permanently physically or mentally unfit for military service" (R. p. 89); stating that he was not in sound health because of "bad eyesight" (R. p. 91).

One of the physicians who treated plaintiff in 1922 (six years before he applied for the insurance policy) testified that he had retinitis pigmentosa as early as 1918 (R. p. 116); that various perimeter charts, describing plaintiff's fields of vision, were made by tests in which the plaintiff took part, and that the purpose of the tests was explained to plaintiff (R. p. 132). Several of the charts are reproduced in the record (R. pp. 120-125).

In September, 1922, plaintiff called on a doctor in Chicago, Illinois, to whom he complained that he could not see well and that he suffered from night blindness (R. p. 176).

Dr. Meyer Wiener testified that he treated plaintiff for "quite a number of years" (R. p. 204); that in January, 1918, he sent him to Barnes Hospital in an effort to discover the reason for the condition of plaintiff's eyes (R. p. 201); that plaintiff "knew his vision was affected" (R. p. 202); that in April, 1922, plaintiff reported his "vision much more blurred" than two weeks before (R. p. 205); that he "worried about his condition from the time I first saw him," and "always worried about his eyes" (R. p. 205); expressed concern about the condition of his eyes, and probably knew that he might lose his eyesight (R. p. 206); that there were blind spots in plaintiff's eyes, the presence of which any intelligent person would notice (R. p. 207).

Plaintiff himself testified that as early as 1918 he noticed that he did not see as well at night as he did during the day; that he was unable to read the writing on the blackboard in school in 1911 (R. p. 217). He admitted that he told the Company's examining physician in 1928 that he had not consulted or been treated by a physician for any

disease or difficulty with his eyes for ten years prior to applying for the insurance (R. p. 220). He admitted that he had been treated by Dr. Wiener and Dr. Wolfner (R. pp. 222, 223); that he consulted Dr. Wescott in Chicago in September, 1922 (R. pp. 222, 223); that Drs. Wescott, Wolfner and Wiener all examined his eyes and took the fields of vision (R. p. 225); that he did not remember whether in January, 1918, his eyesight was good enough to enable him to distinguish a four and one-half inch letter at a greater distance than three feet (R. p. 230); that he knew he was suffering from "difficulty" with his eyesight (R. pp. 235-236).

Petitioner, in the statement of fact on which he relies in asking this Court to issue its writ of certiorari, ignores all the above evidence, and states, at about the middle of page 5 of his petition, "there was **no evidence** that assured knew that he had said disease" (emphasis by petitioner). Again, in the first paragraph of page 8 of his petition for certiorari, petitioner states that Dr. Wiener testified that "the patient would not know what is normal or abnormal. He did not tell Ettman (petitioner) of his condition (R. 206). Nor is there any evidence in the record to show that Ettman knew that he had retinitis pigmentosa."

It is because of the excerpts here quoted from the petition for certiorari that we say petitioner has misrepresented the facts to this Court, and it is because of such misrepresentations that we have made this additional statement of fact. Petitioner's statement that the holding of the Court of Appeals that the Missouri Misrepresentation Statute had no application to this case was "in spite of several Missouri cases holding to the contrary" (Petition, p. 6) is incorrect, and will be specifically noted later.

PETITIONER'S POINT I.

Petitioner argues that where an insurance company receives enough information to put it on notice (presumably that an applicant was suffering from a disease or disabling condition—though petitioner does not say), it waives additional information if it does not request same nor make a further examination, so that it is estopped to deny the insurability of the applicant (Petition and Brief, pp. 11, 20).

Petitioner made this same contention in the Court of Appeals, and that Court properly disposed of it as follows:

> "There was, as the Court ruled, no adequate basis for charging the Company with knowledge of the existence of a disease which the insured himself testified he had not discovered, although the evidence showed that he had had it for nearly twenty years. The fact that the insured wore glasses, was nearsighted and so advised the Company's examiner, was no proof that the examiner had knowledge or notice of the existence of retinitis pigmentosa" (R. p. 321).

As there was nothing to put the Company on notice, there is no need for further discussion of this point and no necessity for considering the law as declared by the cases cited in petitioner's brief.

PETITIONER'S POINT II.

As found by the Court of Appeals, the "Misrepresentation Statute" of Missouri (§5843, R. S. Mo. 1939) "is not applicable to the policy in suit" because it "is not a life policy, but is a disability policy which contains no provision for any death benefit. The application shows that no indemnity for loss of life was asked for by the insured" (R. p. 319).

It has not been held by the Supreme Court of Missouri, nor by either of the Courts of Appeals of Missouri that

the "Misrepresentation Statute" applies to insurance policies which do not provide indemnity for loss of life, nor was it so held in the Kansas case of **Elliff v. Insurance Co.**, 153 Kans. 177, 109 Pac. (2) 92, cited by petitioner.

In **Lamport v. General Accident Fire & Life Assurance Corp.**, 272 Mo. 19, 197 S. W. 95, 96, 100, relied upon by petitioner, the Supreme Court of Missouri had under consideration (l. c. 96 of 197 S. W.) "a suit upon a policy of accident insurance * * * (which) provided an indemnity * * * for loss of life," and also for certain injuries not resulting in loss of life. At l. c. 100 of 197 S. W. the Court said:

> "* * * It has been held that a policy of this character, at least with reference to those portions providing indemnity for loss of life, were policies of life insurance within the meaning of the suicide statute of this state. Logan v. Fidelity & Casualty Co., 146 Mo. 115, 47 S. W. 948. By like reasoning, such a policy, or at least so much thereof as relates to indemnity for loss of life, would likewise be a 'policy of insurance on life,' within the scope of Section 6937, Revised Statutes 1909" [§5843, R. S. Mo. 1939], which is the Missouri Misrepresentation Statute.

In **Makos v. Bankers' Accident Ins. Company** (Mo. A.), 234 S. W. 369, relied upon by petitioner, the policy under consideration "provided for the payment of $300.00 to the beneficiary of the insured 'for loss of the life of the insured'" (l. c. 369). The Court held (l. c. 370) there was no merit in the contention that the Missouri Misrepresentation Statute "does not apply to policies of this kind."

In **Boillot v. Income Guaranty Co.** (Mo. A.), 83 S. W. (2nd) 219, the policy under consideration insured against bodily injuries affected through accidental means, and provided for the payment of $5,000.00 "if such bodily injuries resulted in the loss of life" (l. c. 220). The Court

of Appeals held that the provisions of the Missouri Misrepresentation Statute "are applicable to accident policies, **such as is here in suit**, as well as to ordinary life policies" (l. c. 223).

The three Missouri cases cited above are the only Missouri cases relied upon by petitioner as authority for his contention that the Missouri courts have held that the "Misrepresentation Statute" applies to accident and health policies which contain no provisions for death benefits. None of those cases so declare the law. Each of those cases were considered by the Circuit Court of Appeals in its opinion (R. p. 319). And, as pointed out in the opinion, the courts of Missouri have never expanded that statute to cover insurance policies which provide no indemnity for loss of life (R. p. 320).

The only other case cited by petitioner, and admitted by him to be "not controlling here" (Petition, p. 13), is **Elliff v. Inter-State Business Men's Acc. Co.**, 153 Kas. 177, 109 Pac. (2nd) 92, l. c. 95. In the Elliff case the Supreme Court of Kansas cites **Becker v. Surety Company**, 105 Kansas 99, 181 Pac. 549, as authority for its statement that the "Misrepresentation Statute" of Kansas (G. S. 1935, 40-418) applies to health and accident policies. In the Becker case the policy under consideration provided indemnity for loss of life, and the suit was for death benefits provided by the policy. The Kansas statute is not, as stated by petitioner, "the same statute, word for word" as the Missouri statute, although it is similar. Both statutes provide: "No misrepresentation(s) made in obtaining or securing a policy of insurance on the life or lives of any person * * * shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable." In Becker v. Surety Co., the Supreme Court of Kansas pointed out

that "In express terms the policy provided for 'indemnity for loss of life' by accidental means, and the fact that it also provided indemnity for accidental injuries not resulting in death does not take it out of the purview of the act" (l. c. 550 of 181 Pac.).

Thus, it is seen that in each of the cases relied upon by petitioner the policies under consideration by the state courts of Missouri and of Kansas differ from the policy in the instant case because, in each of those cases, the policy provided indemnity for loss of life, and in the instant case no such indemnity was provided. A thorough search has failed to reveal **any** case in which **any** Missouri court has ever held that the Missouri Misrepresentation Statute (§5843, R. S. Mo. 1939) applies to health and accident policies which do not provide indemnity for loss of life, and as the diligence of petitioner's counsel has not revealed any such case, we confidently assert there are none.

Therefore, it appears that the Court of Appeals, whose opinion this Court is asked to review and reverse, has not misapplied the Missouri law, and has not decided the instant case contrary to any decision of any court of Missouri. And the decision of the Court of Appeals does not violate the rulings of this Court cited under petitioner's point II, which, so far as here pertinent, hold no more than that the federal courts must follow the law as declared by the state courts.

The federal courts cannot, of course, follow the ruling of a state court when the state court has made no ruling.

PETITIONER'S POINT III.

Petitioner mistakenly interprets the law of Missouri to be that without a showing of intentional fraud and deception in the procurement of an insurance policy, payment under the policy may not be avoided regardless of whether relief is sought on the ground of fraud or warranty. In

seeking to support his contention petitioner cites **Glaser v. Pacific Mutual Life Ins. Co.**, 245 Mo. 377, 150 S. W. 549. At local citation 551 of 150 S. W. the Court, in the Glaser case said:

> "In cases not included within the provisions of said Section 6037, R. S. Mo. 1909 (The Missouri Misrepresentation Statute, now Section 5843, R. S. Mo. 1939) **a well-recognized distinction exists between a representation and a warranty in a contract of insurance.** A representation is not a part of the contract, 'but only an inducement to make it,' and will not invalidate the insurance unless false in a matter material to the risk. **A warranty is a part of the contract, and must be strictly true, whether material to the risk or not.** * * * 'It is, however, well settled that **a breach of warranty is fatal to the policy, though the insured had no knowledge of the falsity** constituting the breach, and did not intend to deceive the insurer.' "

Plaintiff also cites **Schuerman v. Ins. Co.**, 165 Mo. 641, 65 S. W. 723; **Kern v. Legion of Honor**, 167 Mo. 471, 67 S. W. 252; **Keller v. Insurance Co.**, 198 Mo. 440, 95 S. W. 903.

In each of these cases there was a policy of life insurance, and, in each case, the suit was for death benefits. The Missouri Misrepresentation Statute applied in each case, and furnished the basis of the discussion by the courts of which petitioner here seeks to take advantage. It has already been seen that the Missouri Misrepresentation Statute does not apply to the policy in this suit because "the policy in suit is not a life policy, but is a disability policy which contains no provision for any death benefit" (R. p. 319).

Furthermore, neither the Schuerman case, the Kern case, nor the Keller case hold, as contended by petitioner, that a showing of "fraud" or "bad faith" is essential where there is a warranty. Instead, those cases, and all

the Missouri cases, hold that even where the Misrepresentation Statute is involved:

> "The statute draws no distinction between innocent and fraudulent misrepresentations and the courts have no right to draw any such distinction."
>
> **Kern v. Legion of Honor**, 167 Mo. 471, 67 S. W. 252, 257.

Jacobs v. Omaha Life Association, 146 Mo. 523, 48 S. W. 462 (erroneously cited in petitioner's brief as "48 S. W. 472"), was also an action upon a policy of life insurance, and therefore constitutes no authority in this case. The Supreme Court of Missouri in the Jacobs case held that a life insurance policy was subject to the Misrepresentation Statute; that the matter misrepresented did not contribute to the death of insured; and that the misrepresentation was therefore immaterial, and that under the statute, the defense of misrepresentation was not available to the insurance company.

Jenkins v. Covenant Mutual Life Ins. Co., 171 Mo. 375, 71 S. W. 688, was, likewise, a suit for death benefits payable according to the terms of a life insurance policy, wherein the insurance company sought to avoid payment by reason "of false representations and warranties as to the then or previous condition of his health" (l. c. 689 of 71 S. W.). The jury were instructed by the trial court that if they found that assured had made untrue statements in a health certificate given by him for the purpose of reinstatement of the policy, and if they further found that the untrue statements "did not relate to matters which contributed to assured's death, then their verdict should be for the plaintiff." The Court held that, since the case fell within the purview of the Missouri Misrepresentation Statute a misrepresentation as to an immaterial matter which did not contribute to the death of assured would not bar the beneficiary's right to recover under the policy, and

that the Misrepresentation Statute applied whether or not the false statement was warranted to be true. But, as pointed out, that was a suit on a policy of life insurance. And, as heretofore pointed out, the policy with which the Court is here concerned is not a life policy, but is a disability policy which contained no provision for any death benefit.

Next, petitioner claims that the opinion of the Court of Appeals in this case is in conflict with the Third Circuit case of **Ward v. Standard Insurance Co.**, 30 Fed. (2d) 328, wherein petitioner says, "The Court of Appeals for the Third Circuit limited the defense to false representations and held there was no warranty" (Petition, p. 14). There was no question of warranty in the Ward case and the Third Circuit did not hold as contended by petitioner.

Petitioner says that the Ward case and **Kettenbach v. Omaha Life Assn.** (Neb.), 69 N. W. 135, "are cited to show that the opinion (of the Eighth Circuit Court of Appeals) is contrary to the better reasoned cases from other jurisdictions and therefore against the weight of authority. We could cite many other cases" (Petitioner's Brief, p. 25).

In reply, we say that the Kettenbach case is the only case cited by petitioner which deals with a situation that is in anywise similar, and, furthermore, it was—as were all the other cases cited by petitioner—a suit upon a life insurance policy, and not upon a policy which provided for the payment of disability benefits alone.

This Court has held in the following cases which went up from Missouri that:

> "answers are warranties, if so declared by the terms of the policy; and if any of them, however immaterial to the risk, is shown to be untrue, the policy is void."
>
> **Piedmont & Arlington Life Ins. Co. v. Ewing**, 89 U. S. 47, 22 Wall. 47, 22 L. Ed. 833;
>
> **Jeffries v. Economical Mutual Life Ins. Co.**, 92 U. S. 377, 23 L. Ed. 610.

PETITIONER'S POINT IV.

Petitioner's contention that the Company's sole defense was that the policy was procured through intentional fraud, and that it therefore waived all other defenses, has already been argued. Furthermore, as declared in the opinion of the Circuit Court of Appeals:

> "The power of this Court to deal with a plain error of law not raised or argued can not be doubted" (R. p. 319).

It was so held by the Supreme Court in the following cases:

Brasfield v. United States, 272 U. S. 448, 450, 47 S. Ct. 135, 71 L. Ed. 345;

New York Central R. R. Co. v. Johnson, 279 U. S. 310, 318, 49 S. Ct. 300, 73 L. Ed. 706;

Wiborg v. United States, 163 U. S. 632, 658, 16 S. Ct. 1127, 1197, 41 L. Ed. 289;

Fairmount Gas Works v. Cub Fork Coal Co., 287 U. S. 474, 480, 53 S. Ct. 252, 77 L. Ed. 439;

Helvering v. Hormel (C. C. A. 8), 111 F. (2d) 1, affirmed 312 U. S. 552, 557, 61 S. Ct. 719, 85 L. Ed. 1037;

Trapp v. Metropolitan Life Ins. Co. (C. C. A. 8), 70 Fed. (2d) 976, 981, certiorari denied 293 U. S. 596, 55 S. Ct. 112, 79 L. Ed. 690.

And if, as petitioner claims, this is a case in which the public interest is involved, that fact alone should furnish sufficient reason for the Court of Appeals to notice the "plain error of law" in order to prevent a manifest miscarriage of justice, and an equally sufficient reason for this Court to deny the petition for certiorari in order that justice may not miscarry.

PETITIONER'S POINT V.

Petitioner's argument that a "case must be decided on appeal on the same theory on which it was tried," fails to take into account the power and duty of the Court of Appeals "to deal with a plain error of law not raised or argued."

Petitioner's reasoning that in dealing with such error of law, the Court of Appeals disregarded the policy of the State of Missouri, is specious, and unsupported by any citation of authority.

Petitioner's contention that the opinion of the Court of Appeals contravenes the recent decisions of this Court because it fails to follow the law of Missouri, is not borne out by any case cited in his petition or brief. Nor is his argument supported by any authority, either Federal or State.

PETITIONER'S POINT VI.

In answer to petitioner's claim that he was entitled to a directed verdict, we say that the whole record warranted the conclusion of the Court of Appeals that "the verdict of the jury was justified by the evidence and the law" (R. p. 321).

CONCLUSION.

In the light of the record in this case, we submit that no injustice has been done to petitioner; that a consideration of all the evidence must lead to the inevitable conclusion that the Company, not the petitioner, was entitled to a directed verdict, as it contended in the District Court and in the Circuit Court of Appeals, which question the Court

of Appeals said it need not decide because of its affirmance of the judgment for the reasons stated in its opinion (R. p. 321).

We submit that petitioner's application for certiorari should be denied.

Respectfully submitted,

WAYNE ELY,
Tenth Floor Commerce Bldg.,
St. Louis, Missouri,
Counsel for Respondent.

KENNETH L. MERLEY,
168 North Michigan,
Chicago, Illinois,
Of Counsel.